

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Disposition of Down Payments and Pending)	
Applications for Licenses Won During Auction No. 35)	
for Spectrum Formerly Licensed to NextWave)	WT Docket No. 02-276
Personal Communications Inc., NextWave Power)	
Partners, Inc. and Urban Comm-North Carolina, Inc.)	

Auction Event No. 35

COMMENTS

3DL Wireless, LLC (“3DL”)¹ submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) September 12, 2002, public notice requesting comment on the disposition of down payments and pending applications for licenses won in Auction No. 35 that had previously been issued to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively “NextWave”) and Urban Comm-North Carolina, Inc. (“Urban Comm”).²

3DL urges the Commission to allow applicants with pending Auction No. 35 applications for NextWave and Urban Comm licenses (the “Applicants”) to withdraw their applications without incurring any form of default penalty. In addition, these licenses should be reaucted pursuant to the same terms and conditions that applied to them in Auction No. 35, if they eventually are returned to the Commission.

¹ 3DL was the high bidder on three licenses in Auction No. 35 with a total net bid of \$15,597,000, and currently has \$467,910 on deposit with the FCC. 3DL also participated in the extended settlement negotiations in 2001 among Auction No. 35 applicants, NextWave and the Commission that sought to reach an agreement that would preserve Auction No. 35’s results.

² FCC Public Notice, *Commission Seeks Comment On Disposition Of Down Payments And Pending Applications For Licenses Won During Auction No. 35 For Spectrum Formerly Licensed To NextWave Personal Communications Inc., NextWave Power Partners, Inc. And Urban Comm -- North Carolina, Inc.*, FCC 02-248 (rel. Sept. 12, 2002).

I. It Is Unreasonable To Maintain The Freeze On Auction No. 35 Applications Under The Current Economic Conditions

3DL is a start-up limited liability corporation that was formed to acquire, hold and operate licenses auctioned in Auction No. 35. 3DL's founders envisioned providing broadband wireless Internet access to rural and underserved markets. Like most start-up telecommunications entities, 3DL has relied upon venture capital and private investment for financing its activities.

Over the past six months since the Commission issued the *Partial Refund Order*³, the main funding sources for start-up companies to pay for licenses, equipment and build-out of networks have effectively dried up.⁴ The telecommunications sector of the economy has been particularly hard-hit by investors' reaction to the many bankruptcies of major telecommunications entities that have been prominently covered by the media.⁵ The Applicants have been severely challenged in this environment, because the contingent liabilities associated with their pending applications "have raised the carriers' costs of capital, impaired credit ratings, and prompted investment bankers to conclude that Auction 35 has increased uncertainty in the wireless industry."⁶ This environment is difficult enough for large carriers, but it is devastating for small, start-up companies that typically lack the ability to self-finance even small-scale projects. Based upon the

³ *Requests for Refunds of Down Payments Made In Auction No. 35*, 17 FCC Rcd 6283 (2002) ("*Partial Refund Order*").

⁴ See, e.g., *For Dow and S&P, Worst Quarter Since '87*, WASH. POST, Oct. 1, 2002, at E1.

⁵ See, e.g., Paul Starr, *The Great Telecom Implosion*, AM. PROSPECT, Sept. 9, 2002, at 20; Federal Communications Commission Chairman Michael K. Powell, Remarks at the Goldman Sachs Communicopia XI Conference, New York, NY (Oct. 2, 2002); Riva D. Atlas, *Market Place: Bad loans and weak trading will reduce J.P. Morgan Chase's earnings more than expected*, N.Y. TIMES, Sept. 18, 2002, at C11; Christopher Stern, *Telecom Slump Continues: Lucent, French Firm Report Setbacks*, WASH. POST, Sept. 14, 2002, at E1.

continued deterioration of financing sources in the last several months and the unexpectedly long delay in the delivery of the Auction No. 35 licenses – 19 months at this juncture – 3DL now concludes that the Applicants should be given the option of withdrawing their Auction No. 35 applications.

This is not a case of the Applicants attempting to sidestep their auction commitments, but rather recognition that they must have flexibility to address the uncertainty that the delay in the Auction No. 35 licensing process has created for their business plans. Allowing the Applicants to withdraw their applications would not confer any kind of benefit or unjust enrichment upon the Applicants and thus would not undermine the integrity of the FCC’s auction process.⁷ Finally, any Applicants that withdraw their Auction No. 35 applications should not be considered in default or be subject to any form of default penalties, such as restriction on rebidding in future auctions, because this is not a default situation.⁸

⁶ J. Gregory Sidak, *The Economic Benefits Of Permitting Winning Bidders To Opt Out Of Auction 35*, Criterion Economics, L.L.C., at http://www.criterioneconomics.com/articles/news_article21.htm (Aug. 26, 2002).

⁷ In fact, the Applicants have lost significant interest income from their license deposit monies and are facing higher costs for capital due to the contingent liability associated with the licenses.

⁸ Defaults occur when the winning bidder “fails to pay the balance of its winning bid by the late payment deadline.” 47 C.F.R. § 1.2109(a). Because the D.C. Circuit has barred the Commission from making the licenses available to the Applicants, there is no basis for default on missed payment grounds. Further, Applicants withdrawing their applications pursuant to Commission authorization should not trigger a default situation under 47 C.F.R. § 1.2109(b), because withdrawals under this section make applicants only “subject to” penalties, which the Commission may modify. See 47 C.F.R. § 1.2104(g)(2). Finally, the Commission’s default penalties are intended to prevent delays in putting licenses into use by dissuading insincere and financially unqualified applicants from participating in the auction in the first place. See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2382 ¶ 197 (1994); see also *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures*, 13 FCC Rcd 374, 433-34 ¶ 101 (1997). Applicants, however, would withdraw their applications, not because of a lack of commitment or financial qualifications, but rather solely because the Commission cannot deliver the licenses in a timely fashion.

II. Licenses That Are Returned To The FCC Should Be Reauctioned Under The Same Terms And Conditions That Applied In Auction No. 35

The statutory goals set forth at Section 309(j) of the Communications Act of 1934, as amended, underpin the Commission's decision to set aside "closed" licenses in Auction 35 for designated entities. Promoting wider auction participation and license distribution remain worthy goals in the public interest and should be continued if the Commission reacquires and reauctions the NextWave and Urban Comm licenses.

Further, the Commission's rule that eliminates entrepreneur eligibility requirements for any C block license that was available, but not sold, in Auction No. 22 or any subsequent auction should not apply to returned NextWave or Urban Comm licenses.⁹ The rationale for adopting the rule was to "prevent additional delays in [the licenses'] utilization" due to entrepreneurs' inability or unwillingness to provide service in particular areas.¹⁰ In contrast, the delays that have occurred in utilizing the NextWave and Urban Comm licenses are entirely unrelated to the ability or willingness of the Applicants to provide service. Further, the impetus for allowing the Applicants to withdraw their applications has nothing to do with the attractiveness of the licenses themselves, but rather the adverse impact that the contingent liability is having on the Applicant's ability to react to current economic conditions.

⁹ See 47 C.F.R. § 24.709(a)(4)(ii).

¹⁰ See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Sixth Report and Order, 15 FCC Rcd 16266, 16281-82 ¶ 29 (2000).

III. Conclusion

For the foregoing reasons, 3DL urges the Commission to permit the Applicants to withdraw expeditiously their applications without incurring any default penalty, including any restriction on rebidding on these licenses in any future auction. In addition, any Auction No. 35 licenses that are returned to the FCC should be reaucted pursuant to the same terms and conditions that applied to them in Auction No. 35.

Respectfully submitted,

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